IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.48 OF 1998
WITH
COMPANY PETITION NO.142/1998 & 346/1998

Marine Container Services (India) Pvt. Ltd.
..Petitioner.
.....

Omega Intermodal Container (Services) Pvt. Ltd.
..Petitioner.
.....

Seagold Finance & Investment Pvt. Ltd.
..Petitioner.

Mr. B.Colabawala with Jayesh Vyas i/by Bilwala and Co. for the Petitioners.

CORAM : A.M. KHANWILKAR, J.
DATED : 21/7/2005.

P.C.:

1. Heard counsel for the petitioners. None appears for the respondent though served and has entered appearance. In fact, the respondents have waived service of notice as can be seen from the order dated 29.11.1999. Indeed, the respondents have filed reply affidavit opposing these petitions. But none appears to oppose the petitions at the time of hearing. This order will dispose of all the three petitions together.

2. In Company Petition No.48 of 1999, the case of the petitioners is that they had agreed to deposit Rs.20/- lacs with the respondent company as Inter Corporate Deposit for specified term. In Company Petition No.142 of 1998, it is stated that the petitioners had agreed to place deposit of Rs.25/- lacs with the respondent company. Similarly in Company Petition No.346 of 1997, it is stated that the petitioner had deposited sum of Rs.23/- lacs with the respondent company as Inter Corporate Deposit. It is seen that the Inter Corporate Deposit was renewed subsequently upto June,1997. The last renewal was made in April,1997. With a view to discharge the liability in respect of each Inter Corporate Deposit, separate post dated cheques were issued by the company in favour of the petitioners of different dates. All those cheques have been returned as dishonoured. Eventually the petitioners issued notice under Section 138 of the Negotiable Instruments Act to the respondent company. The fact that the respondent company had acknowledged its liability to pay the amount to the petitioners can be discerned from the communication sent by the respondents to the petitioners which is

placed at Exh.G in the respective petition i.e. dated 2.4.1997, 14/4./1997 and 1.5.1997 respectively. Even the reply sent by the respondent company to the petitioners in response to Notice under Section 138 of the Negotiable Instruments Act concedes the liability of the respondent company to pay the amount as demanded. As no payment was received by the petitioners, statutory notice was issued by the petitioners on 24.9.1997, 17.1.1998 in respective matters. No reply was given to the statutory notice sent by the petitioners nor any payment was offered. Eventually, the petitioners have filed the subject company petitions in this court under Section-433 and 434 of the Companies Act praying for winding up of the respondent company. The first company petition being Company Petition No.48/1998 came to be admitted by passing conditional order on 21.12.1998; whereas, later two petitions were admitted by separate orders but on the different dates namely 12.2.1999 and 20.4.1999. It is seen from the record that the order admitting company petitions was carried in appeal at the instance of the respondent company. However, all the three appeals came to be dismissed by the Division Bench of this court on 14.7.1999. Eventually the company petitions came to be

advertised and published in terms of order dated 29.11.1999, On which date the respondent company waived notice of the concerned petitions. It is also seen that the provisional Official Liquidator came to be appointed on 5.10.2001 by this court in respect of the respondent company.

3. From the pleadings as filed by the petitioners and the accompanying documents, as mentioned earlier, it is amply clear that the respondent company has acknowledged the liability to pay the subject amount under the three petitions. In fact, the respondent company had issued post dated cheques which were dishonoured.

4. The defence of the respondent company however, as can be seen from the reply affidavit filed before this court is that the amount which was due and payable by the company to the petitioners was duly secured under valid legal licence agreement agreed between the parties. However, from the fair reading of the reply in particular Paragraph 10, it is seen that the respondent company has acknowledged the liability and the fact that the petitioners had placed deposit of the subject amount which is claim amount in respective petition. The defence taken on

behalf of the respondent company that the amount was fully secured by the Leave and Licence Agreement entered between the parties is not bonafide nor honest. The petitioners however, have disputed that the leave and licence agreement was ever acted upon between the parties. Suffice it to observe that from the documents on record, it is certain that the petitioners had placed deposits with the respondent company in the aggregate sum of Rs.68/- lacs. The company, while acknowledging its liability to pay the said amount, has, in fact, paid interest at the rate of 25.5%, which presuppose that the liability is acknowledged liability. As mentioned earlier, inspite of statutory notice given under the Companies Act, no reply was sent by the respondent company nor any payment was offered to the petitioners. In that sense, the legal presumption arising against the respondent company that company is unable to pay its debt has remained unrebutted. Besides, all the three company petitions came to be admitted by the court after considering the rival stand. This court passed conditional order giving opportunity to the respondent company. The respondent company has not paid even the principal amount since 1998, whereas, the respondent company had carried the matter in appeal unsuccessfully.

5. Taking over all view of the matter, it is more than clear that the respondent company is unable to pay its debt and the defence taken on behalf of the company can neither be said to be bonafide or honest especially in the light of the acknowledgement of the respondent company of its liability to pay the debt and the fact that the respondent paid the amount towards the interest to the petitioners as against the inter corporate deposit placed by the petitioners. There is nothing on record to indicate that the assets and properties or the net worth of the respondent company is capable of discharging the huge liability in terms of subject corporate deposits and other liabilities.

6. In the circumstances, this court has no option but to allow the petitions in terms of prayer clause (a) in the respective petition. Ordered accordingly.

7. Official Liquidator to proceed in the matter in accordance with law.

(A.M. KHANWILKAR,J.)